Filed 9/29/06 Doody v. WCAB (Merli Concrete Pumping) CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT DOODY, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD, MERLI CONCRETE PUMPING et al., Respondents.	E039486 OPINION

ORIGINAL PROCEEDINGS; petition for writ of review. Order annulled.

Law Offices of O'Mara & Hampton and Thomas I. Hampton for Petitioner.

No appearance for Respondent Workers' Compensation Appeals Board.

Kegel Tobin & Truce and W. Joseph Truce for Respondents Merli Concrete Pumping and California Insurance Guarantee Association.

In this matter petitioner Robert Doody—the injured worker—seeks review of an order of the Workers' Compensation Appeals Board (Board) that awarded respondents[1] a credit for "overpayment" of sums designated for 24 hour a day attendant care. We agree with petitioner that the Board exceeded its jurisdiction in making the award because the issue had been finally determined earlier in these proceedings.

Statement of the Case

There is no dispute that petitioner suffered catastrophic injuries in a work-related incident in 1997.[2] In the award challenged here, dated November 7, 2005, the Board found that Merli Concrete Pumping (Employer) or CIGA had overpaid $206,824.02 for "attendant care," which would become a credit against future permanent disability payments.[3] The question before us is whether the Board had jurisdiction to consider the

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[1] Respondents are the employer, Merli Concrete Pumping, and the California Insurance Guarantee Association (CIGA). However, CIGA evidently bore the laboring oar throughout; the various petitions for reconsideration were filed in its name alone. We will sometimes refer to CIGA alone as the respondent in question.

[2] This is in some respects inaccurate. Although respondents did not deny that petitioner suffered a blow to the head, they strenuously resisted his efforts to tie his eventual disability to that incident. Apparently objective medical evidence of any neurological injury was lacking, and the eventual diagnosis was that the head injury had led to a condition known as "conversion disorder." Even the workers' compensation judge (WCJ), in his initial decision, found that there was only "slightly more evidence to suggest the chronic conversion disorder," and he noted "continuing reservations regarding the diagnosis of malingering." However, he resolved the question in favor of petitioner, and the finding of compensability is long since final. Hence, there is no longer any viable legal dispute on the point. This fact has not prevented respondents from continually harping on the alleged flimsiness of the underlying claim.

[3] Petitioner has been found totally disabled.

issue of credits, and we will therefore set out the pertinent proceedings, decisions, and petitions in some detail.

In the original findings issued on December 12, 2003,[4] the workers' compensation judge (WCJ) *amended* a previous order dated April 19, 2001, which had required respondents to pay for *24* hour a day attendant care. In June of 2002, Dr. Strauser rendered a persuasive opinion to the effect that petitioner only required *four* hours a day of attendant care. However, although respondents filed a request for "credit" in October of 2002, no action was taken with respect to Dr. Strauser's report until the matter came on for trial in September 2003. Accordingly, although the attendant-care order was changed at that time in accordance with Dr. Strauser's opinion, the WCJ made no order with respect to the payments that respondents had made based on 24 hour care.[5]

CIGA petitioned for reconsideration (Lab. Code, § 5900),[6] *specifically* arguing that it was entitled to a credit for "[respondents'] overpayment of attendant care benefits" as well as raising several other issues. In his "Report and Recommendation," the WCJ recommended that the petition be denied with respect to the attendant-care credit, noting

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[4] "Original" is something of a misnomer, as the matter had been pending since early 1998, and there had been numerous previous interim orders. However, the fundamental issues of injury and causation did not come on for trial until September of 2003. Hence, the resulting order was the "original" one finally resolving major issues.

[5] It is interesting to note that petitioner designated his wife as his chosen caregiver. As a result, respondents paid her over $8,000 per month for her services during the period when the original attendant-care order was in effect.

[6] All further statutory references are to the Labor Code unless indicated otherwise.

that respondents' obligation to pay according to the April 2001 order continued "until the ultimate determination by the court to adopt [Dr. Strauser's] reporting. . . ."

The Board ultimately *granted* CIGA's petition for reconsideration *on the issue of penalties*[7] and the issue of credit for attendant care payments *for periods during which petitioner had actually been hospitalized.*[8] Thus, it remanded the case to the WCJ not only for redetermination of the penalties, but also directing the WCJ "to include an additional finding allowing [CIGA] credit against attendant care for any periods of hospitalization." *However*, the Board concluded its opinion by stating that "other than the penalty and hospitalization credit issues discussed above, *we affirm the WCJ's decision for the reasons stated in his Report.*" The Board did not choose to reconsider this order within the available time period (§ 5911) and CIGA did not seek judicial review. (§ 5950.)

After the further proceedings ordered by the Board, the WCJ rendered a second opinion resolving the issues of credit for hospitalization periods and penalties. CIGA again petitioned for reconsideration, challenging the penalty on the basis that it had reasonable grounds for believing that petitioner did *not* require attendant care prior to the WCJ's 2001 order. CIGA also argued that it was not liable for the payment of a penalty award as a matter of law. This petition also contained a brief reference to the alleged

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[7] Employer had been ordered to pay penalties under section 5814 for unreasonable delay in the payment of benefits.

[8] As to such periods, of course, payment for attendant care would be duplicative.

overpayment of attendant care from June of 2002 (the date of Dr. Strauser's report) through the date of the original decision in December 2003, and the prayer apparently included this amount (along with credits, *e.g.*, sums received in a third-party lawsuit) in a request for a total of about $354,000 in credit against the eventual award.[9]

This time, the Board accepted CIGA's legal argument on the issue of its liability for a penalty based on the delay of an insured or previous insurer (not its own delay), and again remanded for further proceedings before the WCJ. However, it otherwise again rejected any effort to obtain "adjustment of credit," expressly noting that in its first decision on reconsideration, "we affirmed the WCJ's December 12, 2003 decision on all issues but penalty and hospitalization credit." Accordingly, it ruled that these issues—expressly including "overpayment of attendant care" became "*res judicata* and subject to further review by the Court of Appeal."[10] It refused to address the issues again.

The WCJ held yet further proceedings, which resulted in a finding that CIGA was liable for a portion of the penalty that was based on its own delays in paying for care. The WCJ again refused to alter the credits orders, correctly noting that these issues had been settled by previous orders.

Undaunted, CIGA returned to the Board with its third petition for reconsideration, yet again insisting that it was entitled to a credit of $134,400 for overpayment of

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[9] By "eventual award" we mean the life pension that petitioner receives as a weekly payment, which would be reduced to accommodate any credit.

[10] We take this to mean that the issues became subject to review by the Court of Appeal, and, no such review having been sought, became res judicata.

attendant care dated from Dr. Strauser's report. (It also raised other issues.) In his report on reconsideration, the WCJ apparently made the tactical error of addressing this issue on the merits, repeating that the April 2001 order remained in effect until the original decision in December of 2003, and reasoning that no credit was appropriate for any period prior to the actual decision accepting Dr. Strauser's opinion.[11] This time, the Board *accepted* CIGA's arguments regarding the overpayment, without addressing any issue of prior determination or res judicata. It granted the request for a credit for the period between June of 2002 and December 2003, presumably in an amount representing the difference between payment for a full 24 hours of care and for four hours of care.

Petitioner then sought review in this court, arguing that the Board had improperly taken yet another look at the credit issue. We issued a writ of review and now annul the order.

Discussion

In reviewing a decision of the Board, the role of the appellate court is strictly limited by section 5952. However, one of the grounds for reversal is that "(a) The appeals board acted without or in excess of its powers." We believe that the foregoing recitation of the procedural history of the case makes an extended discussion unnecessary. It is clear to us that the Board not only decided the issue of credit for the "overpayment" in its first decision, but that the Board itself recognized the finality of this

[11] Petitioner's answer to the petition for reconsideration, however, *did* very clearly set out the argument that the issue of attendant-care credit had been disposed of by the

[footnote continued on next page]

ruling when it declined to address the issue in its second decision. Accordingly, the Board exceeded its jurisdiction in revisiting the issue on the merits when it was presented for the third time.

In its return to the petition, CIGA presents the argument (which seems to have appeared out of nowhere like Athena from the head of Zeus) that the "plain meaning" of the WCJ's order of December 12, 2003, granting its petition to amend the attendant-care order "was to grant defendants an immediate credit . . . as of the date of the . . . report of Dr. Walter Strausser [*sic*] on June 19, 2002." Of course, as our summary of the case makes obvious, the WCJ did not so understand it, because he recommended that the Board *deny* CIGA's petition for reconsideration in this respect. Thus, the purportedly "plain meaning" of the order escaped the notice of the judicial officer who rendered it.

CIGA then defends the Board's 2005 order as being "consistent with and [] not in conflict with the [2003] decision." Whatever the merits of this argument in the abstract—that is, assuming that CIGA correctly posits the legal effect of the 2003 ruling—it is clear that the Board's 2005 order *is* diametrically inconsistent with the earlier order *as that order was construed in the first reconsideration by the Board.* Even if, as CIGA asserts, the original order by the WCJ "as a matter of law" resulted in a credit, it was up to CIGA to ensure that this result became, as it were, "official." Instead,

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[footnote continued from previous page]
Board in its first decision, which was later confirmed in its second decision. It is not clear why the Board did not at least address this position.

assuming *arguendo* that CIGA *should* have been awarded a credit for the overpayment,[12] the Board ruled that it would *not* receive such a credit. Although it could have done so, CIGA did not seek judicial review of this supposedly erroneous order. Hence, it became a final decision and entitled to res judicata effect. (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 376.) Right or wrong, that decision was "final and invulnerable." (*Merritt-Chapman & Scott Corp. v. Indus. A.C.* (1936) 6 Cal.2d 314, 317.)

The Board, of course, correctly recognized this in its *second* decision. We will not speculate as to why it failed to reach the same result the third time around. However, the order was beyond its power to make and therefore must be annulled.[13]

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[12] CIGA cites no authority to persuade us that the order granting its petition to amend was necessarily completely retroactive; we do not decide the question. We do note the potential for hardship if an employee has received care in good faith, but is later required to suffer a diminution in pension benefits to "repay" for care he "should not" have received.

[13] The Board does always have power to alter or amend an order either in the case of a change to the employee's condition, *or* for any "good cause." (§ 5803.) However, its jurisdiction to do so depends upon a showing of "good cause," and this does *not* mean that a party simply wishes to relitigate an issue. (*Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941, 956.) Rather, "good cause" refers to facts or factors not known to the parties at the time of the original order—new evidence, for example, or a controlling change in the law. (See 2 Hanna, Cal. Law of Employee Injuries & Workers' Compensation (Rev. 2d ed. 2006) § 28.03[1][b], pp. 28-8-28-9.) We also note that the Board's jurisdiction under this section is limited to five years from the date of injury (here September 9, 1997), but, given the delays in this case (the original decision on the compensability issues was not rendered until more than six years had elapsed), we do not consider whether this limitation was also a bar to any attempt by the Board to alter the 2003 decision.

Disposition

The Board is hereby directed to vacate, set aside, and annul its decision insofar as it awards CIGA a credit for overpayment of attendant-care benefits; it shall modify its decision to deny the request as settled by the earlier decisions in this case.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.